

State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44,
subdivision 4, of the Judiciary Law in Relation to

J. MICHAEL BRUHN,

Determination

a Judge of the County Court, Ulster County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Cathleen S. Cenci and Jean M. Savanyu, Of Counsel)
for the Commission

Sise & Sise (By Robert J. Sise) and Cook, Tucker,
Netter & Cloonan, P.C. (By Robert E. Netter) for Respondent

The respondent, J. Michael Bruhn, a judge of the County Court, Ulster County, was served with a Formal Written Complaint dated February 5, 1997, alleging that he made improper remarks concerning a pending case as the guest speaker at a police awards dinner. Respondent filed an answer dated March 31, 1997.

By Order dated April 4, 1997, the Commission designated the Honorable Bertram Harnett as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 6 and 7, 1997, and the referee filed his report with the Commission on December 4, 1997.

By motion dated February 17, 1998, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent filed a cross motion dated March 2, 1998. The administrator replied on March 6, 1998. Oral argument was waived.

On March 12, 1998, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the Ulster County Court since January 1, 1994. As the sole judge of the court, he has jurisdiction over all felony cases in the county. He was a judge of the Kingston City Court from January 1, 1982, to December 31, 1993.

2. In 1995, the state enacted a death penalty statute, which, among other things, provided for a Capital Defender Office. The purpose of the office is to provide representation to indigent defendants in cases in which the death penalty is being sought, to provide training and assistance to other attorneys in capital cases and to provide certain advice to the Court of Appeals. The office is funded by the state.

3. In September 1995, respondent appointed the Capital Defender Office to represent Larry Whitehurst, who was accused of killing a seven-year-old girl in Kingston.

4. The defender office subsequently filed a number of motions, including one for a change of venue based on extensive pre-trial publicity and one for respondent's recusal based, inter alia, on allegations of bias. Respondent never disposed of the recusal motion.

5. In April 1996, while Whitehurst was pending, respondent was asked to speak at a police awards banquet sponsored by the Ulster County Police Chief's Association. The chairman of the event, Frank Brogden, asked respondent to speak about the Whitehurst case; respondent said that it would be improper for him to do so. Mr. Brogden then asked whether respondent could address the new death penalty statute, and respondent agreed.

6. Respondent addressed between 200 and 300 people at the event on May 18, 1996. More than 40 police officers were honored, including four who had been named as witnesses for the prosecution in Whitehurst. Respondent had no actual knowledge of this at the time, although, he acknowledged:

Certainly I know the investigation was done by the Kingston Police Department, since that's where the crime was committed. And, certainly, I know many of the members of the Kingston Police Department, from my years on the bench there, and have seen them in and out of the courthouse.... I never know what case

they are on, but it certainly is easy to guess -- when you know you have a situation like this -- which officers would probably be involved in the investigation. It's a very small detective staff.

None of the four officers was being honored for his work on the Whitehurst case.

7. Other of the honorees were actual or potential witnesses in other cases pending before respondent.

8. Respondent prefaced his speech by stating that he was not addressing any particular case.

9. In his speech, respondent congratulated the honorees as a group, praised the police generally and commented on the rigors of their work.

10. Without specifying them, respondent spoke of constitutional problems with the new death penalty statute.

11. He was critical of the need for the Capital Defender Office and noted that other states do not have one. He questioned state funding of the office, since its "sole purpose" is the "break down" or "defeat" of the death penalty.

12. Respondent said that murder cases can cost as much as \$2 million per case and that half of the convictions are overturned on appeal. Prosecutors had found the statute difficult to work with, he said.

13. He was critical of defense lawyers generally, referring to their use of "technicalities" to block prosecutions and obtain appellate reversals.

14. An account of the speech was published the following day in the Kingston Sunday Freeman.

15. In November 1996, Mr. Whitehurst pleaded guilty to Murder, First Degree, and was sentenced by respondent to life in prison without parole.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(A), 100.3(B)(8) and 100.4(A), and Canons 1, 2A, 3A(6) and 5A of the Code of Judicial Conduct. Charge I of the Formal Written Complaint, as amended at the hearing, is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

At a time when one of the first prosecutions under the state's new capital punishment statute was pending before him, respondent gave a speech to an assembly of police officials that cast reasonable doubt on his ability to be impartial in the case. He criticized the Capital Defender Office appearing in the case, talked of the difficulties of bringing prosecutions under the new statute and disparaged the defense bar in general for asserting constitutional protections that respondent trivialized as "technicalities."

"A judge may speak, write, lecture, teach..." (Rules Governing Judicial Conduct, 22 NYCRR 100.4[B]) but must conduct such extra-judicial activities so that

they do not “cast reasonable doubt on the judge’s capacity to act impartially....” (22 NYCRR 100.4[A][1]). “A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.” (22 NYCRR 100.3[B][8]; see, Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135).

Given the high profile of the Whitehurst case, respondent did not need to mention it by name. His disclaimer that he was not speaking about any particular case was a mockery; he knew that he had been invited to speak because the police chiefs wanted to hear about Whitehurst and the death penalty.

He compromised the proper administration of justice by making such remarks, knowing that claims of bias and adverse pre-trial publicity were already issues in the case.

When he accepted the speaking engagement, respondent should have known that police witnesses in Whitehurst were likely to be among the honorees or in the audience. By praising them, while disparaging the defendant’s counsel, he abandoned the mantle of a neutral and detached magistrate. (See, Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86). A judge must be unbiased and act at all times “in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.” (Matter of Sardino, 58 NY2d 286, at 290-91).

A lawyer judge should be especially sensitive to ethical constraints. (Matter of Salman, 1995 Ann Report of NY Commn on Jud Conduct, at 134, 136). This is

particularly so of respondent in view of his two prior censures by this Commission.

(See, Matter of Bruhn, 1991 Ann Report of NY Commn on Jud Conduct, at 47; Matter of Bruhn, 1988 Ann Report of NY Commn on Jud Conduct, at 133).

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

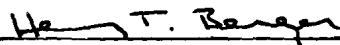
Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Ms. Crotty was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: June 24, 1998


Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct